

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**



75-1371

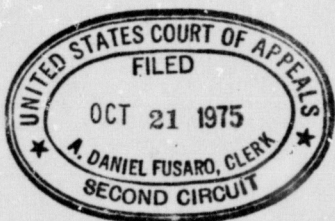
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No.

UNITED STATES OF AMERICA,  
Appellant,  
-against-  
ISRAEL RODRIGUEZ,  
Appellee.

On Appeal From the United States District Court  
For the Eastern District of New York

GOVERNMENT'S APPENDIX



DAVID G. TRAGER  
United States Attorney  
Eastern District of New York  
Attorney for Appellant

PAGINATION AS IN ORIGINAL COPY

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D. C. Form No. 100  
CRIMINAL DOCKET

75-116  
75CR 431

BARTELS, J.

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: MARKS
VS.	
LUIS LABOY, JOSE LABOY and X ISRAEL RODRIGUEZ	
	For Defendant:
Did conspire to distribute quantities of cocaine	

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
Fine,		10/17/75	Govt's notice of		
Clerk,			appeal(RODRIGUEZ)		
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					

DATE	PROCEEDINGS
5-19-75	Before COSTANTINO J - Superseding Indictment filed -
6-9-75	Before JUDD, J - case called - defts & counsels present except for deft Luis Laboy who is reported in the hospital - defts Jose Laboy & Israel Rodriguez arraigned and enter pleas of not guilty - bail contd - case adjd without date for trial before Bartels, J.
6-30-75	Govts Notice of Readiness for Trial filed
7/9/75	Notice of motion to dismiss filed (RODRIGUEZ)
7/13/75	Before BARTELS, J.- Case called- deft's motion to dismiss under six month rule argued- decision reserved-govt's brief by 7/17/75- Reply brief by 7/20/75 trial adjd to 9/15/75 at 10:00 A.M.
9/9/75	By BARTELS, J.- Memorandum and Decision of Order filed dismissing indictment as to deft RODRIGUEZ

75 CR 431

[illegible]

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

U.S.C. Title 21  
Sections 841(a)(1)

- against -

LOUIS LABOY, JOSE LABOY and  
ISRAEL RODRIGUEZ,

Defendants.

----- X

EASTERN DISTRICT OF NEW YORK, SS:

RONALD MELVIN, being duly sworn, deposes and says that he is a Special Agent of the Drug Enforcement Administration appointed according to law and acting as such.

On or about the 3rd day of December 1974, within the Eastern District of New York, the defendants LOUIS LABOY, JOSE LABOY and ISRAEL RODRIGUEZ did possess with intent to distribute approximately 114 grams of cocaine hydrochloride a schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, §841(a)(1).

The source of your deponent's information and the grounds for his belief are:

(1) On December 3, 1974, the defendant LOUIS LABOY was in possession of approximately 114 grams of cocaine.

(2) A statement from an informant who has given reliable information in the past that the defendants JOSE LABOY and ISRAEL RODRIGUEZ were present on December 3, 1974 when negotiations were made for purchase of the aforementioned 114 grams of cocaine

(3) Field test of the above-named quantities of cocaine proved positive.

WHEREFORE, your deponent respectfully prays that the defendants LOUIS LABOY, JOSE LABOY and ISRAEL RODRIGUEZ be dealt with according to law.

S/

Sworn to before me this  
4th day of December 1974.

S/  
UNITED STATES MAGISTRATE  
Eastern District of New York

A TRUE COPY.

S/  
U.S.M. E.D.N.Y.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA,

-against-

LUIS LABOY and JOSE LABOY,

Defendants.

----- x

THE GRAND JURY CHARGES:

COUNT ONE

From on or about and between the 21st day of November, 1974, and the 3rd day of December, 1974, both dates being approximate and inclusive, within the Eastern District of New York, the defendant LUIS LABOY and the defendant JOSE LABOY together with one ALBERTO GUINONE, named as co-conspirator herein but not as a defendant, did wilfully and knowingly combine, conspire, confederate and agree together to commit an offense against the United States in violation of Title 21, United States Code, Section 841(a)(1) in that they did conspire to distribute quantities of cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 846.

In furtherance of said unlawful conspiracy and for the purpose of effecting the objectives thereof, the defendant LUIS LABOY and the defendant JOSE LABOY committed the following:

C V E R T     A C T S

1. On November 21, 1974, ALBERTO GUINONE met with undercover agent Ronald Melvin at Herkimer Street and Rockaway Avenue, in Brooklyn, New York.
2. On December 3, 1974, the defendant LUIS LABOY met with undercover Drug Enforcement Agent Ronald Melvin at Somers Street and Stone Avenue in Brooklyn, New York. (Title 21, United States Code, Section 846).

INDICTMENT

Cr. No. 75 CP 116  
(T. 21, U.S.C., §841  
(a)(1); T. 21, U.S.C.,  
§846)

2-14-75

*Bartels J*

COUNT TWO

On or about the 3rd day of December, 1974, within the Eastern District of New York, the defendant LUIS LABOY and the defendant JOSE LABOY did knowingly and intentionally possess with the intent to distribute approximately one hundred and fourteen (114) grams of cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL.

\_\_\_\_\_  
FOREMAN

\_\_\_\_\_  
DAVID G. TRAGER  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT

Criminal Division

Prepared by

g 2/13/75  
RC. 2/13/75  
BGA 2/13  
Date of filing

PFC:cj  
#743,589

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

orig Filed 5/2/75  
in Dist Ct.  
(Signature)

----- X

UNITED STATES OF AMERICA :

-against- :

LUIS LABOY and JOSE LABOY, :

Defendant(s) :

----- X

NOTICE OF READINESS  
FOR TRIAL

Court Docket No.

75 CR 116

S I R (S) :

PLEASE TAKE NOTICE that the United States is ready  
for trial.

Since the defendant(s) is/are not in custody a  
trial date will be requested as soon as the case can be  
reached by the Court, subject to receiving three days'  
advance notice of the actual date for trial.

Dated: Brooklyn, New York  
May 2, 1975

Yours, etc.

DAVID G. TRAGER  
~~EDWARD JOHN BOYD~~  
Acting United States Attorney  
Eastern District of New York

By \_\_\_\_\_

PAUL F. CORCORAN  
Assistant U.S. Attorney

TO:

+ HONORABLE John R. Bartels  
United States District Judge

-----  
Attorney(s) for Defendant(s)

+ Phillip Peltz, Esq.  
32 Court Street  
Brooklyn, New York 11201

Richard Rosenbaum, Esq. (Levy for d)  
225 Broadway  
New York, New York 10007

F:JMM:lm  
751794

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

-against-

LUIS LABOY, JOSE LABOY and  
ISRAEL RODRIGUEZ,

Defendants.

----- X

*Bortels J*

SUPERSEDING  
INDICTMENT

Cr. No. 75CR431  
(T. 21 U.S.C. §841(a)(1);  
T. 21 U.S.C. §846; T. 18  
U.S.C. §2).

*5-19-75*

THE GRAND JURY CHARGES:

COUNT ONE

From on or about and between the 21st day of November, 1974, and the 3rd day of December, 1974, both dates being approximate and inclusive, within the Eastern District of New York, the defendants LUIS LABOY, JOSE LABOY, and ISRAEL RODRIGUEZ, together with one ALBERTO GUINONE, named as co-conspirator herein but not as a defendant, did wilfully and knowingly combine, conspire, confederate and agree together and with each other to commit an offense against the United States in violation of Title 21, United States Code, Section 841(a)(1) in that they did conspire to distribute quantities of cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 846.

In furtherance of the conspiracy and for the purpose of effecting the objectives thereof, the defendants committed, among others, the following:

O V E R T   A C T S

1. On November 21, 1974, the defendants LUIS LABOY and JOSE LABOY met with another at 88 Stone Avenue, Brooklyn, New York.

2. On December 3, 1974, the defendants LUIS LABOY, JOSE LABOY and ISRAEL RODRIGUEZ met with another at 88 Stone Avenue, Brooklyn, New York.

3. On December 3, 1974, the defendant LUIS LABOY met with Drug Enforcement Administration Special Agent Ronald Melvin at Somers Street and Stone Avenue, Brooklyn, New York to sell Agent Melvin three (3) ounces of cocaine.

(Title 21, United States Code, Section 846).

COUNT TWO

On or about the 3rd day of December, 1974, within the Eastern District of New York, the defendants LUIS LABOY, JOSE LABOY, and ISRAEL RODRIGUEZ, did knowingly and intentionally possess with the intent to distribute approximately one hundred and fourteen (114) grams of cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL.

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FOREMAN.

---

DAVID G. TRAGER  
United States Attorney  
Eastern District of New York

TPP: JM/ps  
F.# 751, 794

TO: \_\_\_\_\_  
Defendant(s).  
TO: LEGAL AID SOCIETY, RICHARD  
ROSENBAUM, PHILIP PELTZ.  
Attorney(s).

UNITED STATES OF AMERICA

:

INDICTMENT

vs.

:

Criminal No. 75 CR 431LUIS LABOY, JOSE LABOY AND  
ISRALE RODRIGUEZ,

:

Mailed May 28, 1975

Defendants.

:

:

PLEASE TAKE NOTICE that the above-captioned case will be called in the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on the 5th day of June, 1975, at 9:30 in the forenoon, Fourth Floor, Courtroom #4, before the Honorable John R. Bartels, United States District Judge, at which time the defendant herein will be required to plead to the Indictment heretofore filed for an alleged violation of the United States Code.

Judge Bartels, to whom this case has been assigned for all purposes including trial, has requested that defense counsel be prepared at the time of this pleading to make all applicable pre-trial motions regarding suppression, inspection and discovery. Because of the limited time available following receipt of this notice, oral motions will be entertained.

If defendant(s) fail(s) to attend, a warrant will be issued for his/her/their arrest.

cc: Judge Bartels  
Calendar Commissioner, US Marshal

DAVID G. TRAGER  
UNITED STATES ATTORNEY

By JONATHAN MARKS/ps  
Assistant US Attorney

A-32.0

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA,	:	
-against-	:	<u>NOTICE OF MOTION</u>
ISPAEL RODRIGUEZ,	:	<u>TO DISMISS</u>
Defendant.	:	75 CR 431

-----X

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavit of JOANNA SEYBERT, duly sworn to this 7th day of July, 1975, and upon all the papers and proceedings heretofore and herein, the undersigned will move this Court before the Honorable JOHN R. BARTELS, in the United States District Court for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, at a date and time to be set by the Court for an order dismissing the Indictment in the above-captioned case, pursuant to Rule 50 (b) of the Federal Rules of Criminal Procedure, and for such other and further relief as to this Court may seem just and proper.

Yours, etc.,

FEDERAL DEFENDER SERVICES UNIT  
THE LEGAL AID SOCIETY  
26 Court Street, Room 701  
Brooklyn, New York 11242

TO: DAVID G. TRAGER  
UNITED STATES ATTORNEY  
EASTERN DISTRICT OF NEW YORK  
BROOKLYN, NEW YORK

CLERK OF THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
UNITED STATES OF AMERICA, :  
 :  
 -against- :  
 : AFFIDAVIT  
ISRAEL RODRIGUEZ, : 75 CR 431  
 :  
 Defendant. :  
-----X

STATE OF NEW YORK ) SS:  
COUNTY OF KINGS )

JOANNA SEYBERT, being duly sworn deposes and says:

That she is an attorney associated with FEDERAL DEFENDER SERVICES UNIT/LEGAL AID SOCIETY, the attorney of record for the defendant herein, ISRAEL RODRIGUEZ.

That this affidavit is submitted in support of defendant's motion for an order dismissing the Indictment in the above captioned case, pursuant to Rule 50 (b) of the Federal Rules of Criminal Procedure.

The defendant was arrested on December 3, 1974 and arraigned before the Honorable MAX SCHIFFMAN on December 6, 1974. At the time of the arraignment a hearing date was set for December 16, 1974, which hearing was waived after appearance of counsel.

The defendant and two other individuals, Luis Laboy and Jose Laboy were arrested for a violation of Title 21, §841 (a)(1). Luis Laboy and Jose Laboy were subsequently indicted on February 13, 1975 for a violation of Title 21, U.S.C. §841 (a)(1) and §846, contained in Indictment 75 CR 116, and entered a plea of not guilty before Your Honor. A notice of readiness was filed by the Government for Indictment 75 CR 116, on May 2, 1975.

On May 19, 1975, counsel for defendants Luis Laboy and Jose Laboy, appeared before Your Honor, on a motion to suppress, pursuant to Rule 41 (e) FRCP. At that time, the Court requested that Mr. Israel Rodriguez and your deponent be present for the defendants' hearing. Since, the defendant, Israel Rodriguez had

not been indicted, I indicated to the Court that the defendant was not joining in the motion to suppress. At the conclusion of the suppression hearing a trial date of July 28, 1975 was scheduled.

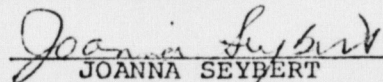
At the time of this hearing, your deponent was informed by Assistant United States Attorney, Jonathan Marks that the Government intended to indict Mr. Rodriguez for the same violation as contained in Indictment 75 CR 116. I indicated to Mr. Marks, at that time, that Mr. Rodriguez had been arrested on December 3, 1974 and the six month period in which the Government must be ready for trial was due to expire. Mr. Marks assured your deponent that "there will be no six month problem."

A superceding indictment, 75 CR 431, was filed on May 20, 1975, charging Israel Rodriguez, Luis Laboy and Jose Laboy with conspiring to distribute cocaine and distributing cocaine, based on facts and circumstances alleged in Indictment 75 CR 116, and contained in the complaint 74 M 1684.

On June 6, 1975, the defendant Israel Rodriguez appeared before the Honorable ORRIN JUDD, then sitting as miscellaneous part judge and entered a plea of not guilty to indictment 75 CR 431, and the case was assigned to Your Honor as a related case.

To date, your deponent has not received a Notice of Readiness for trial and inspection of the Court's file for Indictment 75 CR 431, fails to disclose if any such notice has ever been filed.

Your deponent submits the Government was not ready for trial within the six month period contemplated in the Plan for Achieving Prompt Disposition of Criminal Cases, effective April 1, 1973 in the United States District Court for the Eastern District of New York, pursuant to the requirements of Rule 50 (b) of the Federal Rules of Criminal Procedure and any further relief that this Court may seem just and proper.

  
JOANNA SEYBERT

Sworn to before me this

8th day of July, 1974.

*Edward J. Kelly*

EDWARD J. KELLY  
Notary Public, State of New York  
No. 24-7214731  
Qualified in Kings County  
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

----- X

UNITED STATES OF AMERICA

- against -

LUIS LABOY, JOSE LABOY and  
ISRAEL RODRIGUEZ,

Defendants.

AFFIDAVIT IN OPPOSITION  
TO MOTION TO DISMISS THE  
INDICTMENT

75 CR 431

----- X

JONATHAN M. MARKS, being duly sworn, deposes and  
says:

1. I am an Assistant United States Attorney, of  
counsel to DAVID G. TRAGER, United States Attorney for the  
Eastern District of New York. I submit this affidavit in  
opposition to the motion of the defendant Israel Rodriguez  
to dismiss the superseding indictment in the above-captioned  
action.
2. The defendants Luis Laboy, Jose Laboy and Israel  
Rodriguez were arrested on December 3, 1974, and arraigned the  
following day on a complaint charging them with possession  
with intent to distribute cocaine.
3. On February 14, 1975, an indictment (75 CR 116)  
was filed against Luis Laboy and Jose Laboy, charging them  
with one substantive and one conspiracy count arising out of  
their sale of cocaine to an undercover agent. The Laboy's  
were arraigned on the indictment before the Honorable John  
R. Bartels on February 27, 1975. Israel Rodriguez was not  
indicted at that time because the Assistant then handling the  
case believed that the evidence against Rodriguez was not strong  
enough to insure conviction. However, that determination was  
made solely on the basis of the agent's reports and over the  
objection of the case agents and without the benefit of an

interview by the Assistant with the informant.

4. On May 2, 1975, the government filed a Notice of Readiness, and the case was set down for trial on May 19, 1975.

5. As I informed the Court on May 19, 1975, I interviewed the informant for the first time on May 17, and, on the basis of that interview, determined that the evidence warranted an indictment of Rodriguez with the Laboy's (Tr. 3, 10-11).<sup>\*</sup> I so informed Mr. Agnello, Judge Bartels law clerk, on Saturday, May 17 (Tr. 3). On the following day, after I had made that decision, I learned for the first time that the Laboy's intended to call Rodriguez as a defense witness (Tr. 11). As the Court summarized the facts: "you mean you made your decision before he decided to testify on behalf of the defense" (Tr. 11).

6. On May 19, I informed the Court and all defense counsel, including Mrs. Seybert, who represents Israel Rodriguez, (named in the complaint but not in the initial indictment) that on the basis of information developed two days before, the Government intended to indict Israel Rodriguez as well later in the day, that Rodriguez would be charged for his participation in the crime alleged in the initial indictment, and that the Government was ready for trial (Tr. 3, 8, 11).

7. With respect to a new trial date, I stated that "I am prepared to go to trial as soon as Mr. Rodriguez has had an opportunity to prepare his defense" (Tr. 13).

8. The Court explained the situation to Mrs. Seybert as follows:

THE COURT:

\* \* \*

"Here is Mrs. Seybert.

You were appointed to represent Mr. Rodriguez

<sup>\*</sup> References are to the minutes of the suppression hearing and related proceedings in this case on May 19, 1975.

and he was arraigned before Magistrate Schiffman. it has been decided, I am told by Mr Marks, to indict Rodriguez this afternoon. We are about to try this case but a request has been made for an adjournment of the trial so that Rodriguez can be tried at the same time.

They want an adjournment of this case at a point that is most convenient now to Mr. Peltz.

Before granting that date, we want to know what your schedule is. Everything that Mr. Peltz has received will be delivered to you if you continue to represent Mr. Rodriguez.

If you have any ideas on dates, I will follow Mr. Peltz' suggestion. You talk to him. I will try it in July for him if his defendant will be prejudiced by any later date.

Since he says he has schedules, too, I said I will put it down for such date as he wishes the case to be tried."

9. Upon the agreement of all defense counsel, including Mrs. Seybert, the Court set the case down for trial on July 29, 1975, and proceeded with a suppression hearing. Mr. Rodriguez and his attorney, Mrs. Seybert, were present for the hearing, although Mrs. Seybert did not join in the motion, presumably because she believed that the 6 months from the date of Rodriguez's arrest (which Mrs. Seybert <sup>inconsistently</sup> believed occurred in September 1974) may have already run and did not wish to waive that defense (Tr. 17, 24).

10. On May 20, 1975, the Government filed the superseding indictment (75 CR 431) naming Rodriguez as a defendant.

11. The pleading notices to defense counsel was mailed on May 28 and, since Judge Bartels was then on vacation, the arraignment was scheduled by Judge Judd, the miscellaneous judge, for June 5 and adjourned to June 6, 1975. Rodriguez was arraigned on that date and interposed a plea of not guilty to the superseding indictment.

19  
12. In sum, by the time Rodriguez was indicted on May, 1975 - well within the 6 months from the time of his arrest - the Government had informed the Court and all defense counsel, including Mrs. Seybert, that it was ready for trial, and a trial date had been set and discovery ordered.

In these unique circumstances it is submitted that the filing of a Notice of Readiness was unnecessary and that the Government has complied with the Speedy Trial Act. At the very most, on these facts, the Government's failure to file a written Notice of Readiness within six months was "excusable neglect".

WHEREFORE, it is respectfully submitted that the motion of the defendant Israel Rodriguez to dismiss the indictment must be denied.

S/  
JONATHAN M. MARKS  
Assistant U.S. Attorney

Sworn to before me this  
18th day of July 1975.

---

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :

-against- :

ISRAEL RODRIGUEZ, :

Defendant. :

75-CR-431

-----x  
Appearances:

HON. DAVID G. TRAGER  
United States Attorney  
Eastern District of New York  
Attorney for United States of America  
225 Cadman Plaza East  
Brooklyn, New York 11201  
JONATHAN M. MARKS, ESQ.  
Assistant U.S. Attorney  
Of Counsel

FEDERAL DEFENDER SERVICES UNIT  
THE LEGAL AID SOCIETY  
Attorney for Defendant  
26 Court Street, Room 701  
Brooklyn, New York 11242  
JOANNA SEYBERT, ESQ.  
Of Counsel

BARTELS, District Judge

The defendant, Israel Rodriguez, moves pursuant  
to Rule 50(b) of the Federal Rules of Criminal Procedure to  
dismiss the indictment against him because of the Govern-

ment's failure to comply with Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases adopted pursuant to Rule 50(b). Rule 4 provides that:

"In all cases the government must be ready for trial within six months from the date of arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, or within the periods as extended by the district court for good cause under rule 5, and if the defendant is charged only with non-capital offenses, then upon application of the defendant or upon motion of the district court, after opportunity for argument, the charge shall be dismissed."

On December 3, 1974, Rodriguez was arrested with two co-defendants, Luis Laboy and Jose Laboy, and was charged with possessing cocaine with intent to distribute the same in violation of 21 U.S.C. §§841(a)(1) and 846. All three defendants were arraigned before a U.S. Magistrate on December 6, 1974, and pleaded not guilty and subsequently, on February 13, 1975, all of the defendants except Rodriguez were indicted. On May 19, 1975, the defendants Luis Laboy and Jose Laboy appeared for trial before this Court but the Government requested an adjournment on the ground that new information made it apparent that Rodriguez should also be

A-42

indicted and tried with the other two defendants. An adjournment to July 29, 1975, was granted in the presence of and with the consent of Ms. Joanna Seybert, counsel for Rodriguez, who had been appointed by the Magistrate at Rodriguez's arraignment on December 6, 1974, after his arrest. Rodriguez was subsequently indicted in the afternoon of May 19, 1975, and the indictment was filed on May 20, 1975. Two and one-half weeks later, on June 6, 1975, Rodriguez was arraigned on the indictment and pleaded not guilty. On June 30, 1975, the Government filed its Notice of Readiness.

Rodriguez claims that the six-month period for readiness as contained in Rule 4, supra, expired on June 3, 1975, and that the indictment should be dismissed because the Government failed to both schedule the arraignment on the indictment and file its notice of readiness prior to that date. In response the Government claims that it was actually ready to proceed to trial on May 19, 1975, a date within the six-month period, and that its readiness to so proceed was actually conveyed in open court to the defendant and his attorney, thereby making unnecessary the mere technicality of filing a formal written notice of readiness.

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It is not disputed that the six-month period is to be measured from December 3, 1974, the date of arrest, and the Government does not claim any exclusions of time pursuant to the provisions of Rule 5 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases. Therefore, there is no question that the six-month period expired on June 3, 1975, and that the Government was required to comply with Rule 4 prior to that date. We find, however, that the defendant was not calendared for a pleading on the indictment until three days after the expiration of the six-month period.

Here the Government's failure to file a written notice of readiness prior to June 3, 1975, is not fatal since actual notice of readiness was given to the defendant on May 19, 1975, and the Government was actually ready to proceed to trial on that date subject to Rodriguez being indicted. After hearing arguments for both sides, the Court faults the Government in two respects: (A) failure to indict Rodriguez between December 3, 1974 and May 19, 1975, and (B) failure to insist on an arraignment on the indictment prior to June 3, 1975. The Government attempts to explain its failure to indict Rodriguez until May 19, 1975, on the

ground of newly discovered evidence from an informant. It must be noted, however, that the reason for the delay in receiving this new information was the failure on the part of the attorneys for the Government to interview the informant until two days prior to the scheduled trial date despite the fact that his identity was known. Instead of interviewing the informant himself, the Government chose to rely solely on an agent's report concerning the information available from the informant. This clearly amounted to inadequate investigation.

Referring to the second fault, which is fatal to the Government, the Government had two and one-half weeks to arraign Rodriguez prior to June 3, 1975, without doing so. In United States v. Bowman, 493 F.2d 594 (2d Cir. 1974), clarifying United States v. Valot, 473 F.2d 667 (2d Cir. 1974), the defendant was arrested on November 16, 1972 and indicted on May 8, 1973. On May 9, 1973, the Government filed its notice of readiness and on May 21, 1973, the defendant was arraigned on the indictment. The six-month period expired on May 16, 1973, and the defendant was not arraigned until five days after the expiration of that period despite the fact that the Government's notice of readiness was filed

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prior to the expiration of the period. The Court found that a notice of readiness is not effective as a practical matter until issue is joined and accordingly held that within the six-month period the Government must require the defendant to plead and it must file its notice of readiness. Although the Court found excusable neglect in the Government's failure to have the defendant arraigned within the six-month period, caused by understaffing arising from the transition in the United States Attorney's office, it made it quite clear that a similar neglect in the future would not be tolerated.

Here, unlike Bowman, the Government's failure was not occasioned by excusable neglect and the principle there outlined is dispositive of this case. Joinder after the six-month period in the circumstances of this case made it impossible to try the case before the expiration of that period, even though the Government might have been ready for trial before joinder in view of its prior preparation to try the two co-defendants. While such a result may seem to be harsh on the Government, it is necessary to prevent the circumvention of Rule 4 by indicting and filing a notice of readiness on the eve of the expiration of the six-month

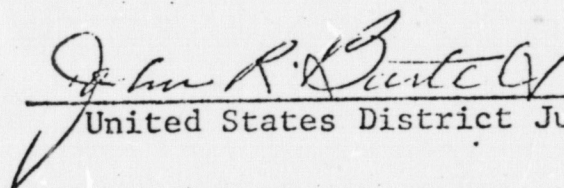
A-46

period and the delaying arraignment for several weeks.

Here Rodrigues did not waive his right to be arraigned within the six-month period and, consequently, the indictment must be and hereby is dismissed.

SO ORDERED.

Dated: Brooklyn, N.Y.,  
September 8, 1975.

  
United States District Judge

A-47

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA :

-against- :

ISRAEL RODRIGUEZ, :

75-CR-431

Defendant. :

-----x  
BARTELS, D.J.

MEMORANDUM-DECISION and ORDER

(  
The United States moves for reconsideration of the Court's decision of September 8, 1975, granting the motion of the defendant Israel Rodriguez to dismiss the indictment against him for the Government's failure to comply with Rule 4 of the Second Circuit Rules Regarding Prompt Disposition of Criminal Cases ("the Rules"). After hearing reargument and examining the additional briefs, the Court adheres to its original decision of September 8, 1975. Accordingly, the order dismissing the indictment must stand.<sup>1/</sup>

The Government argues that the case of United States v. Bowman, 493 F.2d 594 (2d Cir. 1974), which construed Rule 4 of the Rules, does not require the harsh result of a

dismissal of the indictment under the unusual and unique circumstances of this case, and that the Government has in fact complied with the Rule as interpreted by the Court in Bowman. Alternatively, it contends that if it failed to comply with Rule 4 of the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases ("the Plan"), that failure was the result of excusable neglect.

While a restatement of the series of events outlined in our prior decision is unnecessary, the Government points to two special facts which it claims distinguish this case from Bowman. These facts are that on May 19, 1975, (1) the Court, with the consent of Rodriguez's attorney, set July 29, 1975 as the trial date for all three defendants, a date which was adjourned to September 16, 1975, at the Court's request, and (2) the Court ordered discovery to be completed by Rodriguez's attorney. It is the Government's position that the reason for the Court's insistence in Bowman on an arraignment prior to the expiration of the six-month period, was that in the ordinary case it is only after arraignment that "the case could be assigned to a judge for all purposes, including the disposition of pretrial motions and the conduct of the trial itself." Id. at 597.

Accordingly, the Government concludes that since in this case a trial date had been set and discovery ordered, unlike in Bowman, Rule 4 was satisfied as far as readiness was concerned, and that the requirement of an arraignment prior to the expiration of the six-month period was a mere empty formality.

This argument, however, ignores the simple fact that Rule 4 of the Plan required the Government to be ready for trial within six months from the date of Rodriguez's arrest and that having failed to arraign Rodriguez within that six-month period, it could not possibly have been ready for trial until three days after the six months since until arraignment it would have been impossible to try the case. Again the Court must emphasize the striking factual similarity of both Bowman and United States v. Valot, 473 F.2d 667 (2d Cir. 1974), to the present case. In both of those cases the Government filed its notice of readiness within the six-month period but failed only to have the defendant arraigned within that time. While the Bowman Court did not require that the case be actually tried within the six-month period, it held that in order to be ready for trial the Government must first arraign the defendant. The essence of that

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requirement and the concern of the Court were to insure the prompt disposition of criminal cases by avoiding all forms of prosecutorial delay, including delay in arraignment. The Court remarked:

"The scheme of the Plan, like the Second Circuit Rules which preceded it, was not to 'mandate trial within a specified time' but to focus 'primarily on prosecutorial delay as a means of implementing the public interest in disposition of criminal charges with reasonable dispatch.' Hilbert v. Dooling, supra, 476 F.2d at 357."

An arraignment serves a much more important purpose than simply providing a time for the assignment of a judge, who in turn will set a trial date and order discovery; as stated in Bowman, the purpose of Rule 4 was "to insure that the government would file its notice of readiness only after pleading." Id. It is true that while on May 19, 1975, all material turned over to the other defendants was ordered delivered to Rodriguez, <sup>2/</sup> his counsel was expressly accorded the right to make any motions at a later date. Under Rule 16(f) Rodriguez had a right to make discovery motions at any time within ten days after arraignment or at such later date as the Court might permit. As a matter of strict procedural requirements, it is impossible to try a defendant before his

plea and for that reason the setting of a trial date is meaningless before the defendant has entered his plea. In this case it was expected that Rodriguez would certainly be arraigned before the expiration of the six-month period.

Turning now to the question of excusable neglect, we believe that it is clear from Bowman that the failure to arraign the defendant within six months does not fall within the category of excusable neglect as is manifested by the last paragraph of the Court's decision where it stated:

"Our decision does not mean that a similar practice on the part of the prosecutor will be countenanced in the future. Having now had fair warning of our clarification of the Valot remand, he must at the risk of dismissal of an indictment conform to the six-month requirement as herein clarified."

The Government seems to think that this result is too harsh and unwarranted under the straight-jacket theory of United States v. Pierro, 478 F.2d 386, 389 (2d Cir. 1973). The Court does not agree because after the trial was adjourned from May 19, 1975 to July 29, 1975, caused by the dilatory indictment of Rodriguez, the Government had ample time to arraign him within the time period and its failure to do so was the second time that the Court was presented with a form of prosecutorial delay. No reason for its failure to timely

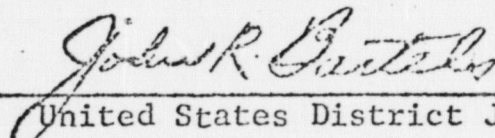
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arraign Rodriguez was offered.

Therefore, under these circumstances, we find that the Government failed to comply with Rule 4 of the Plan and that such failure was not occasioned by excusable neglect, and the indictment against Israel Rodriguez is dismissed.

SO ORDERED.

Dated: Brooklyn, N.Y.,  
September 18, 1975.

  
United States District Judge

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#### FOOTNOTES

- 1/ It should be noted that the controversy arises under the Eastern District Plan for Achieving Prompt Disposition of Criminal Cases ("the Plan") promulgated pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure and not under the antecedent Rules as indicated in the Court's prior decision. Rule 4 of the Plan provides:

"In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days."

The Government, however, concedes that in substance Rule 4 of the Plan and Rule 4 of the Rules are identical.

- 2/ This situation would not be present if there were no co-defendants. Thus, an arraignment would assume greater importance in the absence of other defendants who had been previously arraigned.

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## AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK } ss

EDWARD R. KORMAN

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 20th day of October 1975 he served a copy of the within

Brief and Appendix for the Appellant

by placing the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.

The Legal Aid Society

Federal Defender Services Unit

509 United States Courthouse

Foley Square, New York, N. Y. 10007

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

*Edward R. Korman*

EDWARD R. KORMAN

Sworn to before me this

20th day of October 1975

*Gene B. Cohen (Seal)*

GENE B. COHEN (SEALACQUA)  
Notary Public, State of New York  
No. 24-0683955  
Qualified in Kings County  
Comm. Expires March 30, 1977

1  
2 UNITED STATES DISTRICT COURT  
3 EASTERN DISTRICT OF NEW YORK  
4 -----x

5 UNITED STATES OF AMERICA, :

6 - against - :

75 CR 116

7 LOUIS LABOV and JOSE LABOV, :

8 Defendants. :  
9 -----x

10 United States Courthouse  
11 Brooklyn, New York

12 May 19, 1975  
13 10:00 o'clock a.m.

14 B E F O R E :

15 HONORABLE JOHN R. BARTELS,

16 U. S. D. J.  
17  
18

19 \* \* \* \*  
20  
21

22 MICHAEL J. MIELE  
23 OFFICIAL COURT REPORTER.  
24  
25

A P P E A R A N C E S :

DAVID G. TRACER, ESQ.  
United States Attorney for the  
Eastern District of New York

BY: PAUL CORCORAN, ESQ.  
Assistant United States Attorney  
-and-  
JONATHAN MARKS, ESQ.  
Assistant United States Attorney.

RICHARD ROSENBAUM, ESQ.  
Attorney for Defendant Louis Laboy

PHILIP PELTZ, ESQ.  
Attorney for Defendant Jose Laboy

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1 MR. MARKS: I spoke with Mr. Agnello, your law  
2 Clerk, on Saturday. I informed Mr. Agnello of the pos-  
3 sibility that I would be asking your Honor for an  
4 adjournment this morning. The reason for the adjourn-  
5 ment is that on my review of the case -- I believe this  
6 is a three defendant case and the third defendant  
7 should be Israel Rodriguez. Israel Rodriguez is not  
8 named in this indictment.

9 It is my intention to indict Israel Rodriguez  
10 this afternoon. I think that since he participated in  
11 all the transactions which are involved in this case,  
12 it would be in the interest of judicial economy if you  
13 would grant our motion for adjournment to give us an  
14 opportunity to supersede.

15 THE COURT: What do the defendants say about  
16 this?

17 MR. PELTZ: Israel Rodriguez was arrested along  
18 with the two defendants at the bar. The government did  
19 have their opportunity when they presented this case,  
20 had they any evidence against him to have presented  
21 same to the Grand Jury.

22 THE COURT: When were Laboy and Rodriguez  
23 arrested?

24 MR. MARKS: On December 4, 1974, your Honor.

25 THE COURT: Where are these gentleman from?

1 MR. PELTZ: They are Americans of Puerto Rican  
2 ancestry.

3 THE COURT: How long have they been in this  
4 country?

5 MR. PELTZ: My client went to high school in  
6 Brooklyn.

7 THE COURT: Who -- he's not a new arrival?  
8 Louis has been here 14 or 15 years?

9 MR. PELTZ: When this case was before you on  
10 March 10th, the Government agreed to turn over all  
11 discovery and 3500 material that we can.

12 I received a call from Mr. Marks on Saturday  
13 to recently -- to advise me he just inherited the  
14 case and he had five additional discovery or Brady  
15 material for me which I collected in this building  
16 Sunday, May 18th, yesterday.

17 Mr. Marks was here Saturday and left an  
18 envelope for me. I called this to your attention be-  
19 cause at the time of the pretrial conference fixing  
20 today for trial, I asked your Honor orally if you  
21 would inspect the Grand Jury minutes. You indicated  
22 it wasn't your practice to do so and declined to do  
23 so.

24 THE COURT: What is the basis of your request?

25 MR. PELTZ: My request is that the review of

1 the material given me by the Government would justify  
2 such a motion.

3 THE COURT: Why? Why is your case any dif-  
4 ferent than any other case involving Grand Jury?

5 MR. PELTZ: The information before the Grand  
6 Jury is insufficient to even establish probable cause  
7 on which to find an indictment.

8 It doesn't even satisfy the Costello standing  
9 under hearsay. There is nothing, hearsay or otherwise,  
10 which your Honor would find sufficient.

11 MR. MARKS: There is more than enough probable  
12 cause in my judgment.

13 THE COURT: What is this charge?

14 MR. PELTZ: There is a two-count indictment  
15 before the Court.

16 THE COURT: There is nothing in there. I am  
17 perfectly willing to do that but I don't think the  
18 defendant has a right unless he's asked to go over  
19 the Grand Jury every time a defendant comes before  
20 the Court. You better be right.

21 I am not here to satisfy every suspicion that  
22 you might have.

23 MR. PELTZ: When I made a written motion last  
24 week, I didn't have the Grand Jury minutes. I only  
25 had them yesterday. If I didn't get them all --

1 MR. MARKS: I turned over all the Grand Jury  
2 minutes yesterday.

3 MR. CORCORAN: Mr. Peltz received all 3500  
4 material over a month ago with the exception of the  
5 informer's statement before the Grand Jury.

6 THE COURT: Now, you made a charge here,  
7 Mr. Peltz, which the Government denies.

8 Did he or did he not turn it over?

9 MR. PELTZ: Mr. Corcoran says he turned over  
10 all 3500 material.

11 MR. CORCORAN: With the exception of the in-  
12 formant's statement.

13 THE COURT: Did you tell him at the time?

14 MR. CORCORAN: Yes.

15 THE COURT: He doesn't have to turn over any  
16 3500 material.

17 MR. PELTZ: Except in such case as this, where  
18 an agreement was made, it would be turned over in a  
19 week, but it wasn't turned over for two months.

20 MR. CORCORAN: There was never any agreement  
21 made.

22 THE COURT: All right, forget it, Mr. Peltz.  
23 Having had an opportunity to read the Grand  
24 Jury minutes -- do you have them there?

25 MR. PELTZ: Yes. Here they are, only 10 pages.

1 THE COURT: Do you want me to read them now, I  
2 will read them now.

3 Just have a seat.

4 (Pause.)

5 THE COURT: There is nothing to this. Nothing  
6 at all. Much less probable cause has often been  
7 sufficient for an indictment. There is nothing to  
8 that request.

9 An indictment is entirely different from a  
10 trial. You don't have to have beyond a reasonable  
11 doubt.

12 Proceed. Let's have the next question.

13 Nothing at all to it, Mr. Peltz. I am amazed  
14 that you thought there was.

15 Have you read many Grand Jury minutes? It is  
16 clearly a case where there is probable cause.

17 What is your next motion?

18 MR. PELTZ: The next motion would be for a  
19 hearing pretrial under Rule 41.

20 THE COURT: We will have it right now.

21 Wait a minute. We never did decide whether  
22 we are going to postpone this trial. Do you object  
23 to the postponement of the trial?

24 MR. PELTZ: The defendant Jose Laboy is ready  
25 to proceed and objects to any postponement.

THE COURT: Do you object?

1 MR. ROSENBAUM: No, your Honor.

2 MR. MARKS: Mr. Rosenbaum has not informed  
3 me whether or not his client is going to plead to  
4 the indictment.

5 THE COURT: That's no ground for a post-  
6 ponement at all.

7 THE COURT: To what date do you want a post-  
8 ponement?

9 MR. MARKS: The Government is prepared to  
10 proceed today but as I said before, I think that would  
11 be in the interest of judicial economy to have a  
12 trial of all three defendants at once, since the  
13 evidence of all three is the same and we are dealing  
14 with the same transactions.

15 THE COURT: Provided there is no prejudice to  
16 the defendants.

17 You have had this case for some time and you  
18 just can't take all this time and finagle around  
19 and come here on the day of the trial and say you  
20 want a postponement.

21 Let me see to what extent the defendants would  
22 be prejudiced before I make a decision.

23 Why didn't you make this application long ago?

24 MR. MARKS: The case was re-assigned to me over  
25 the weekend.

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THE COURT: That's no excuse. This business of re-assignment has caused more judicial loss of time than any other factor.

The Judge is supposed to take time off and accommodate the U. S. attorney's office. I am not impressed by that argument at all.

What I am impressed with is this and you, as an officer of the Court, can understand this, I don't want to have two trials on the same day and go over the same evidence, if it is true he is really going to try this third party.

On the other hand, if you are prejudiced by a postponement, I will certainly consider it but we must be fair but I am not, I am a lot sympathetic -- I am not sympathetic to you.

MR. MARKS: I am not urging that as a ground for adjournment at all.

As I said I am prepared to go to trial this minute. I have familiarized myself with all the facts and I have interviewed all my witnesses. But I do believe in view of my review of the case over the weekend --

THE COURT: Why didn't you review the case before and bring in this third party?

MR. MARKS: New evidence came to me over the

1 weekend. I met the informant and had a number of  
2 interviews with him and on the basis --

3 THE COURT: Why didn't you contact the informant  
4 before this weekend?

5 MR. CORCORAN: Based on the agents' reports  
6 and case files, it wasn't my understanding, prior to  
7 this weekend, that Mr. Rodriguez was involved as he  
8 was.

9 THE COURT: You didn't know Rodriguez was so  
10 involved?

11 MR. CORCORAN: The same --

12 THE COURT: It wasn't until this weekend that  
13 you obtained this information?

14 MR. PELTZ: I understand that Israel Rodriguez  
15 was arrested with the two Laboy defendants, was  
16 contacted by someone over the telephone who said he  
17 was Jonathan Marks from the U. S. attorney's office,  
18 and who indicated to Mr. Rodriguez a desire to speak  
19 to him, coupled with an offer to send two peace officers  
20 to collect him by automobile and bring him down here  
21 yesterday.

22 When Mr. Rodriguez said yesterday wasn't con-  
23 venient, he was then told over the phone how would  
24 this morning be, and at this point he said the defense  
25 subpoenaed him and he was to be in my office at 8:00 this

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1 morning where in fact he was represented by someone  
2 from the Legal Aid at which point he was advised  
3 by phone that his appearance wouldn't be required.

4 MR. MARKS: That's not all together accurate.

5 THE COURT: There seems to be some competition  
6 for Rodriguez.

7 Is he around now?

8 MR. PELTZ: He is seated in the Courtroom.

9 MR. MARKS: It wasn't until Saturday that I  
10 intended to indict Mr. Rodriguez. I called Mr. Rodriguez  
11 on Sunday. Several minutes later, I realized this  
12 man was represented by counsel, so I called him back  
13 and told him I didn't want to speak to him and that  
14 I would speak with his lawyer this morning.

15 At that time he volunteered he was planning  
16 to testify on behalf of the defense.

17 My decision was on Saturday.

18 THE COURT: You mean you made you decision  
19 before he decided to testify on behalf of the defense.

20 You have a situation of conflicting interest.  
21 You want the trial right away because Rodriguez  
22 is prepared to testify right away. He wants a  
23 postponement so he can indict Rodriguez.

24 He can testify for you even if he is indicted.  
25 Why did he have counsel before?

1 MR. PELTZ: At the Magistrate's arraignment --

2 THE COURT: From whom did you obtain this addi-  
3 tional information wich leads you to believe that  
4 Rodriquez is also subject to an indictment?

5 MR. MARKS: From the information.

6 THE COURT: He didn't give you that informa-  
7 tion before?

8 MR. MARKS: He gave me a more fulsome.  
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1 MR. MARKS: Fortunately, I had the benefit  
2 of these interviews with the informant and on the basis  
3 of that I am firmly convinced that Mr. Rodriguez  
4 should be indicted or whether he is tried in this case  
5 or any other case he is going to be indicted.

6 THE COURT: When will he be indicted?

7 MR. MARKS: This afternoon.

8 THE COURT: What's the time span that you are  
9 asking for an adjournment?

10 MR. MARKS: I am prepared to go to trial as  
11 soon as Mr. Rodriguez has had an opportunity to  
12 prepare his defense.

13 THE COURT: You place everybody in an embarrass-  
14 ing situation.

15 I couldn't try any cases in June, I will be  
16 abroad. I can try them in July.

17 MR. MARKS: It would be a two-day trial.

18 THE COURT: Every estimate I get, particularly  
19 from the Government, is not correct.

20 How many witnesses will you have, roughly?

21 MR. PELTZ: Depending on how the Government  
22 proof goes in, I might have zero to four witnesses,  
23 possibly a fifth.

24 MR. MARKS: We have three witnesses.

25 THE COURT: Do you think you can examine and

1 2 cross-examine eight witnesses in two days and have  
2 summation and charge?

3 MR. MARKS: No, I think two days would be  
4 unrealistic. Perhaps three or three and a half days.

5 THE COURT: Can you have your Rule 41 motion  
6 heard this morning, at all events?

7 MR. PELTZ: I would be possibly desirous  
8 to do that.

9 THE COURT: What date do you suggest? Why  
10 don't we do that. Get in touch with Miss Seybert.  
11 What harm could it be to you, Mr. Petlz, if we hear  
12 your 41 motion now and if you adjourn the case until  
13 July?

14 MR. PELTZ: I have no objection to having  
15 the Rule 41 motion today. As far as the prejudice  
16 which will attend a postponement to July, I am sure  
17 there will be so now I must think how to delineate  
18 that to your Honor.

19 THE COURT: You mean you are going to find  
20 prejudice willy-nilly?

21 Don't do it that way.

22 MR. PELTZ: Certainly, the man who is a key  
23 defense witness would, after today, be a co-defendant  
24 and that would prejudice my position.

25 He will be indicted today at all events, and

15  
1 3 by the time the trial gets going , he would be indicted  
2 He may not be tried because Miss Seybert wouldn't  
3 be ready but she could get ready pretty promptly.  
4 Have you got all the information you need from  
5 the indictment? You got all the 3500 material.  
6 MR. PELTZ: Yes.  
7 THE COURT: And you have the Grand Jury  
8 minutes.  
9 MR. PELTZ: Yes.  
10 THE COURT: You can give those to her.  
11 MR. PELTZ: There would be a personal prejudice  
12 to me in that I plan to be away during July.  
13 THE COURT: When are you coming back?  
14 MR. PELTZ: My plans were to be away in July  
15 and if need be to come back as such business that  
16 would be required in August.  
17 Should I be fortunate enough --  
18 THE COURT: You can't be that fortunate.  
19 MR. PELTZ: If I have to come back in August,  
20 all right.  
21 THE COURT: Under those circumstances, I will  
22 accommodate you.  
23 MR. PELTZ: If I am going to have to come back  
24 it will necessitate my coming back the last week of  
25 July.

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4 THE COURT: What do you want? If you want  
an adjournment, I will accommodate you.

MR. PELTZ: Could I make a telephone call?

THE COURT: Do you want to have the 41 Motion  
heard first?

Here is Mrs. Seybert.

You were appointed to represent MR. Rodriguez  
and he was arraigned before Magistrate Schiffman.

It hasn't been decided, I am told by Mr. Marks  
to indict Rodriguez this afternoon. We are about  
to try this case but a request has been made for an  
adjournment of the trial so that Rodriguez can be tried  
at the same time.

They want an adjournment of this case at a  
point that is most convenient now to Mr. Peltz.

Before granting that date, we want to know  
what your schedule is. Everything that Mr. Peltz  
has received will be delivered to you if you continue  
to represent Mr. Rodriguez.

If you have any ideas on dates, I will follow  
Mr. Peltz' suggestion. You talk to him. I will try  
it in July for him if his defendant will be prejudiced  
by any later date.

Since he says he has schedules, too, I said I  
will put it down for such date as he wishes the

1 case to be tried.

2 MRS. SEYBERT: I don't have my schedule with  
3 me.

4 MR. PELTZ: All defense counsel, if it is  
5 convenient to your Honor and the Government, have  
6 agreed on July 29th.

7 MRS. SEYBERT: I believe the Government intends  
8 to obtain an indictment this week.

9 THE COURT: This afternoon.

10 MRS. SEYBERT: All right. I understand he  
11 was arraigned on this in September of '74. I am  
12 assured by Mr. Marks that six months has not passed.

13 THE COURT: They just discovered, the day  
14 before yesterday, additional information which  
15 justifies an indictment of Rodriguez.

16 I will give you July 29th, I would prefer  
17 August 4th, the following Monday, but I am not too  
18 sure of that either.

19 Let me put you down for July 29th and if what  
20 I have on my schedule indicates that August 4th  
21 might be better, would you agree?

22 MR. PELTZ: Certainly.

23 THE COURT: Put it down for July 29th, with  
24 a possibility to August 4th.

25 Leave it for the 29th. We will see how the

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ball bounces.

MR. MARKS: Does your Honor want to proceed with the suppression hearing?

THE COURT: Yes.

All right, let's proceed.

MR. MARKS: Before we proceed, I would like to raise the question of whether your Honor feels that Mr. Rodriguez should be present, should be represented at this suppression hearing?

THE COURT: Was he involved? Was something taken from him?

MR. MARKS: No, your Honor.

The articles that Mr. Peltz is moving to suppress were all taken from Jose LaBoy.

THE COURT: We can have Seybert up here. Can we get her up here?

MR. ROSENBAUM: Your Honor, since I understand that Agent Melvin is here and he was the agent that arrested Louis LaBoy and according to the Grand Jury minutes, certain items were taken from Louis LaBoy as well, I'd like permission to join in this motion.

THE COURT: Certainly you may. See if you can get in touch with Seybert to come up here. I don't believe it is necessary for her to be here since nothing was taken from him.

1 Can we hurry up and do it?

2 MR. PELTZ: Your Honor, less my silence, after  
3 Mr. Marks spoke, he deemed a manifestation to my  
4 assenting to what he said, may I submit that my  
5 understanding that the pistol in question was not  
6 taken from the person but rather from the seat --  
7 under the seat of the automobile that he was driving.

8 MR. MARKS: It was taken from the automobile.

9 THE COURT: Is that the only thing taken  
10 from the automobile?

11 MR. MARKS: Yes, your Honor.

12 THE COURT: As I read the minutes, I don't  
13 remember anything about an automobile there.

14 MR. PELTZ: The automobile that Jose was  
15 driving has been seized and in fact, I have sought  
16 futilely for its return administratively and have  
17 included the prayer for the return of the automobile  
18 in this motion, in addition to which I have asked  
19 that the contents of the trunk, which were tools --

20 THE COURT: That wasn't contraband.

21 MR. PELTZ: No, sir.

22 THE COURT: The only contraband was the pistol;  
23 is that right, Mr. Marks?

24 MR. MARKS: Yes, your Honor.

25 THE COURT: Now, while we are waiting, is

1 that necessarily contraband?

20

2 MR. MARKS: It is certainly evidence and I  
3 believe it is contraband, yes.

4 THE COURT: I don't know why it would be  
5 contraband.

6 MR. MARKS: The gun was not registered and  
7 it is my understanding that that makes it contra-  
8 band.

9 THE COURT: Oh, it is not a registered gun.  
10 But certainly one can carry a gun in an automobile  
11 providing it is registered?

12 MR. MARKS: In addition, Mr. LaBoy was in the  
13 car and he had contraband on him.

14 THE COURT: Oh, he did?

15 MR. MARKS: Yes, he did.

16 THE COURT: It seems harsh to take an auto-  
17 mobile just because it has an unregistered gun.

18 What kind of a car was it?

19 MR. PELTZ: 1969 LeSabre, Buick.

20 Would this be the appropriate time to ask  
21 your Honor to consider granting defense counsel's  
22 motion, since I am assigned under CJA, for a transcript  
23 of the proceedings which will ensue?

24 THE COURT: Yes. You certainly will have a  
25 transcript. Whether you will get daily is another

1 matter. You can get this transcript, certainly.

2 But there has been recently an abuse of the right to  
3 get daily transcript by appointed counsel and running  
4 up a terrific expense and subjecting the Court, from  
5 the Administrative Office, to make a great number of  
6 requests for transcripts.

7 Well, if it is absolutely necessary such  
8 a request will be granted but it will be looked at.

9 MRS. SEYBERT: I have about four other  
10 matters including an 11:00 o'clock calendar at the  
11 Magistrate's office.

12 THE COURT: This is a simple matter.. We want  
13 to be sure he is represented. Although nothing  
14 was seized from him -- well, do you think --

15 MRS. SEYBERT: I haven't seen Mr. Rodriguez  
16 in several months and I am not prepared to proceed  
17 on any suppression hearing.

18 THE COURT: We are not asking you to proceed  
19 because nothing was taken from him. We are being  
20 extra cautious and that's all.

21 If you hear some testimony which you think  
22 is prejudicial you can object later. But we are  
23 going ahead with the suppression hearing, Mrs. Seybert.  
24 It is a very simple proposition. He is not going to  
25 be put on the stand.

1                   Isn't that right?

2                   MR. PELTZ:    You are right.

3                   THE COURT:  I wouldn't get alarmed and I  
4                   hope I have alleviated some of your pain.

5                   MRS. SEYBERT:  If I could go back and get  
6                   my file --

7                   THE COURT:  You can go back and get back as  
8                   soon as possible.  This is going to be short.  
9                   Everyone is ready.  All you have to do is sit in.  
10                  If you find it is something, after you look at the  
11                  minutes, which prejudices Rodriguez, then you can  
12                  make such application as you deem necessary.

13                  That's all.

14                  I doubt whether it is necessary you be here  
15                  but I'd like to have you or someone from the Legal  
16                  Aid Society here to listen.

17                  Could you be kind enough to do that?

18                  MRS. SEYBERT:  I certainly shall.

19                  THE COURT:  Do you want to say anything else?

20                  MR. PELTZ:  Nothing further, your Honor.

21                  THE COURT:  You are going to put on a witness?

22                  MR. MARKS:  Two witnesses, your Honor.

23                  THE COURT:  And they are going to testify  
24                  to what they saw and what happened; is that right?

25                  MR. MARKS:  That's correct.

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1 THE COURT: And the basis of your objection,  
2 Mr. Peltz, is what? Was this car moving at the time?

3 MR. PELTZ: That is a close question of fact,  
4 sir.

5 THE COURT: It is rather important.

6 MR. PELTZ: I know what I have been told.  
7 I don't know what the Government's position will be.  
8 I don't know whether they will contend --

9 THE COURT: Where was it seized?

10 MR. PELTZ: In Brooklyn, in the vicinity fo  
11 Stone Avenue and Somers Street.

12 THE COURT: Now, it wasn't next to the home  
13 of any of these defendants, was it?

14 MR. PELTZ: It was in the nearby vicinity.

15 THE COURT: So it is not a question of it  
16 being parked right in the driveway?

17 MR. PELTZ: No, sir.

18 THE COURT: It is not like U. S. v.  
19 Frankolino? Do you want to look at this case?

20 MR. PELTZ: I'd appreciate looking at it.

21 THE COURT: This is back in 1966. Sit down  
22 and relax and look at it and we will wait. We  
23 will just have to wait, gentlemen.

24 I will stay here so that no time will be  
25 wasted.

1 MR. PELTZ: I have a gentlemen who has . . .  
2 responded to a subpoena issued on behalf of the  
3 defendant Jose Laboy, a Mr. Ted Posce, who is here  
4 in behalf of the New York City Community College.

5 Inasmuch as I will not require his appearance,  
6 may I have a direction that this witness appear here  
7 on such adjourned date?

8 THE COURT: Yes, give him the adjourned  
9 date.

10 THE CLERK: Yes, the date is July 29th,  
11 1975 at 10:00 o'clock.

12 THE COURT: I direct you to return here on  
13 July 29th at 10:00 o'clock.

14 MRS. SEYBERT: I am not prepared for this  
15 motion at this point in time. My client has not  
16 yet been indicted.

17 I am not familiar with the law but the  
18 DeBello case involving a pre-indictment hearing as to  
19 one defendant, not knowing the full implications  
20 of that hearing, I request that the Court allow  
21 myself and Mr. Rodriguez to remain in the courtroom  
22 and permit us to make our own separate motion and  
23 not join in this motion. .

24 My client may not be indicted this afternoon.  
25 At this time he is not an indicted defendant.

1 THE COURT: Yes, I will grant that. You can  
2 make such motions as you desire but on the other  
3 hand, I want you to be here and hear the testimony so  
4 that you are not going to be in a position later to  
5 say that you had no notice of this hearing.

6 If you have any objections or motions,  
7 thereafter, it is entirely up to you.

8 Out of caution, I think it is advisable that  
9 you be here with Mr. Rodriguez who is about to be  
10 indicted. Although Mr. Rodriguez is in a position  
11 where nothing has been taken from him and in all  
12 probability there will be no harm done even if he  
13 had been indicted and you were fully prepared to  
14 proceed.

15 You can hear and listen. Any motions you  
16 make will be available to you. You may decide  
17 whether or not such a motion would be fruitless  
18 as far as you are concerned. You claim nothing was  
19 taken from Rodriguez?

20 MR. MARKS: That's correct.

21 THE COURT: He is charged with conspiracy  
22 and that might be relevant. I don't know. That  
23 might be relevant in determine whether he was a party  
24 to a conspiracy which ultimately resulted in the  
25 seizure which is now objected to.

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